

**RESOLVING BUSINESS DISPUTES THROUGH LITIGATION OR
ALTERNATIVES: THE EFFECTS OF JURISDICTIONAL RULES AND
RECOGNITION PRACTICE**

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1. Introduction

Since the jurisdictional rules and the recognition practice in the various U.S.-jurisdictions on the one hand, and in the European States on the other, differ substantially, their impact on litigation resulting from transatlantic business transactions is indeed significant. What has already for some time been well known to practitioners specializing in the field of international business transactions became apparent in the course of the negotiations on a global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters within the framework of the 19th Session of the Hague Conference on Private International Law in June 2001.

It was above all the conflict between the U.S.-American delegates and the delegates of the EU-countries that prevented any approximation of the conflicting views on key issues of the envisaged Convention.

The negotiations on a global “convention on jurisdiction, and recognition and enforcement of foreign judgments” had been initiated by the United States of America in the early nineties¹ and, at the 18th Session of the Hague Conference in October 1996, the delegations decided to include the judgment convention in the agenda of the 19th Session. However, the preliminary draft convention of 1999 had been vigorously rejected by the Head of the U.S. Delegation², who asserted, that “the project ...stands no chance of being accepted in the United States” because of “fatal defects in the approach, structure and details of the text”³.

¹ Cf. *von Mehren*, Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful? 57 *RabelsZ*, 449 [1993]; *Schack*, Perspektiven eines weltweiten Anerkennungs- und Vollstreckungsuebereinkommens, *ZEuP* 1993, 306.

² Cf. *von Mehren*, Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed ? 49 *Am.J.Comp.L.* 191 [2001], quoting the letter of Jeffrey *Kovar* of 22 February 2000.

³ Cf. *von Mehren*, Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed ? 49 *Am.J.Comp.L.* 191 [2001], quoting the letter of Jeffrey *Kovar* of 22 February 2000.

From the American perspective, the goal of the Convention should be the facilitation of the enforcement of decisions of American Courts abroad, especially in Europe, since enforcement of decisions of European Courts in most U.S.-jurisdictions is easier and often not dependent on the requirement of reciprocity like in the majority of European States (as e.g. in my country, Austria). The primary interest of the American delegation was to ascertain that decisions by U.S.-Courts which exercised their jurisdiction in actions brought against “defendants doing business in the U.S.” should become more widely recognized and enforced by Courts in other States.

In striking contrast thereto, the European States hoped to eliminate certain rules leading to the jurisdiction of U.S.-Courts as “exorbitant”, and it was and still is the American practice of recognizing “doing business in an American State” as basis for accepting jurisdiction that European lawyers and judges consider clearly excessive⁴.

Thus, it was of no surprise the second Commission of the Conference could not reach a common position in a number of questions, especially on the issue of exercising jurisdiction and ended in a serious disagreement and an obvious impasse⁵.

The fundamental transatlantic disagreement has not just occurred recently, however: Already nearly two decades ago the so-called “jurisdiction conflict with the United States of America” formed the topic of a conference held in Munich⁶ which centered on the “doing-business-in-the-U.S.-issue”. In his key contribution⁷, Rolf *Stürner* referred to cases like “*In re Anschuetz*”⁸, “*Laker Airways Ltd*”⁹, “*Marc Rich AG*”¹⁰, “*Deutsche Bank*”¹¹ and numerous other cases to support his conclusion that “U.S. law extensively dominates the transatlantic legal relationship”¹².

Therefore, the problem with which we are dealing today is not a new one. Because of the globalization process in trade and commerce, the global liberalization of cross-border sales of goods and supply of services under GATT and GATS and the increasing use of electronic means of communication in international transactions, its solution has become even more urgent ever since.

⁴ Two recent cases that were launched by relatives of US citizens who were killed in a ski train fire in the Austrian Alps demonstrating the exercise of jurisdiction by an US District Court in a product liability claim against a foreign defendant are: *In re ski train fire in Kaprun, Austria on November 11, 2000.*; Def.: SIEMENS AG, 2002 U.S. Dist. Lexis 14563 (S.D.N.Y. 6 Aug. 2002); Def. BOSCH REXROTH AG, 2002 U.S. Dist. Lexis 14929 (S.D.N.Y. 14 Aug. 2002).

⁵ Cf. *Wagner*, Die Bemühungen der Haager Konferenz für Internationales Privatrecht um ein Uebereinkommen über die gerichtliche Zuständigkeit und auslaendische Entscheidungen in Zivil- und Handelssachen IPRax 2001, 533;.

⁶ The conference papers were published, cf. *Habscheid* (ed.), *Der Justizkonflikt mit den Vereinigten Staaten von Amerika – The Jurisdiction Conflict with the United States of America* (1986).

⁷ *Stürner*, *Der Justizkonflikt zwischen U.S.A. und Europa*, in *Habscheid* (ed.), *Der Justizkonflikt mit den Vereinigten Staaten von Amerika – The Jurisdiction Conflict with the United States of America* (1986) 3.

⁸ 754 F. 2d 602 (5th Cir.1985).

⁹ 731 F.2d 909 (4th Cir.1984).

¹⁰ 707 F.2d 667 (2d Cir. 1983).

¹¹ 550 F.Supp. 24 (W.D. Michigan 1982).

¹² *Stürner*, *Der Justizkonflikt zwischen U.S.A. und Europa*, in *Habscheid* (ed.), *Der Justizkonflikt mit den Vereinigten Staaten von Amerika – The Jurisdiction Conflict with the United States of America* (1986) 10: “*Weithin regiert U.S.-Recht die europäisch-amerikanischen Rechtsbeziehungen*”.

2. Jurisdiction

An explanation for the difficult relationship between European and U.S. rules on jurisdiction, whether on the federal or on the state level, and recognition and enforcement of foreign Court decisions, may be found in the fundamental differences between the two in the exercise of jurisdiction. European observers have the impression that the U.S. federal and Courts examine the jurisdiction issue from a perspective that centers on the question of whether the defendant's factual connections to the forum state¹³ may be sufficient for exercising jurisdiction over him. Sometimes this feature of the modern U.S.-American law of jurisdiction is explained by referring to the historical fact, that originally the physical presence of persons and things was considered to be the basis for exercising judicial power¹⁴. Due to changing circumstances and a practice that is altogether favorable to the plaintiff, defendants having "minimum contact" with a U.S.-American jurisdiction may be sued before a Court there, provided that the "due process" requirement of the 5th and 14th Amendment to the U.S.-American Constitution is not violated. Thus, the criteria of "fairness" and "reasonableness" have become crucial for the jurisdiction issue, and may result in the denial of jurisdiction, as would the finding that a more convenient forum exists elsewhere. Nevertheless, in the eyes of European practitioners the American rules on jurisdiction and especially the "transient jurisdiction" are just exorbitant.

In contrast thereto European national civil procedure laws and the European Community Regulation "Brussels N° 1"¹⁵, providing the respective rules for lawsuits between parties of different EU-Member States¹⁶, focus on the normative contacts which the legal relationship on which the law suit is based may actually have to a national law. Notwithstanding their inapplicability to transatlantic cases¹⁷, the rules of the EC Regulation may serve as an example for the way the Courts in Europe approach the jurisdiction issue,

The general rule on jurisdiction of the Regulation "Brussels N° 1", is¹⁸ that persons domiciled in a Member State shall, irrespective of their nationality, be sued in the Courts of that Member State. The rule "*actor sequitur forum rei*" is a vested principle in the European national civil procedure laws and complies with the rules of general jurisdiction in American State laws insofar as the requirement of domicile of the defendant in a state is concerned. The defendant's "doing business" alone, even if intensive and sustained, cannot qualify as sufficient to justify the exercise of general jurisdiction by the Courts of a EU Member State.

¹³ *Viz.* either an activity of the defendant, or the effects of the defendant's activities in the forum state.

¹⁴ *Cf.* the famous statement of Justice O.W. Holmes *jr* which is frequently quoted by Europeans.: "The foundation of jurisdiction is physical power", *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

¹⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O. J. L 12 of 16.1.2001 p.1 –23. This regulation replaces the "Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters" and entered into effect on 1 March 2002. Many of the rules of the Regulation comply with the respective rules of the Convention.

¹⁶ With the exception of Denmark.

¹⁷ With the exception of Articles 22, 23, *cf.* Art. 4 (1) Regulation.

¹⁸ *Cf.* Art. 2 (1) Regulation.

In addition thereto, the “Regulation Brussels N° 1” provides rules on specific jurisdiction in its Articles 5 to 7, beginning with a series of jurisdictions subject to plaintiff’s choice. Thus, a person domiciled in one Member State may be sued in another Member State in the Courts for the place of performance of a contractual obligation under dispute (e.g. in the case of a sale of goods, at the place in a Member State where the goods were delivered or ought to have been delivered, or in the case of supply of services, at the place in a Member State where the services were supplied or should have been supplied)¹⁹; “in matters relating to tort, delict or quasi-delict²⁰, in the Courts for the place where the harmful event occurred or may occur²¹; in the case of “a dispute arising out of the operations of a branch, agency or other establishment, in the Courts for the place in which the branch, agency or other establishment is situated”²²; etc.

The latest of these examples of a “specific jurisdiction” to which a plaintiff may resort under the “Regulation Brussels N° 1” shows the difference in the European and the American approach to jurisdiction more clearly. In order to bring a claim before a Court of the state where “a branch, agency or other establishment” of a defendant corporation is located, it is necessary that the dispute “arises of the operations of that specific “branch, agency or other establishment”. What is necessary under European law is a substantial connection of the ground for the claim and the business activities in that Member State, where the law is initiated. Thus, European lawyers strongly support the concept of a “transacting business-jurisdiction”²³.

On the other side, U.S. Courts would not exercise jurisdiction in proceedings instituted against a plurality of defendants of which one has its domicile in the state of the forum on the mere basis of a close connection of the claim against the resident with the claims against the other defendants²⁴. Therefore, American judges would not consider the provision of Article 6 of the “Regulation Brussels N° 1” to be consonant with “due process”.

The European rules on jurisdiction have also found a way to take into account the position of typically weaker parties in a lawsuit, such as consumers *vis-à-vis* businessmen or employees *vis-à-vis* their employers. Thus, differentiations are made, where the American Law adheres to traditional concepts of the Common Law such as contracts and torts and examine all contract cases and all tort cases in the same way²⁵. The specific provisions of the “Regulation Brussels N° 1” on “jurisdiction over consumer contracts”²⁶ and on “jurisdiction over individual contracts of

¹⁹ Cf. Art. 5.1. a) b) Regulation.

²⁰ The French notions for non-contractual (tortious) liability.

²¹ Art 5.3. Regulation.

²² Art 5.5. Regulation.

²³ Therefore, it was of no surprise that the issue of a “general doing business-jurisdiction”, caused the impasse in the preparation of a global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters in the Hague: Whereas the Europeans wanted to put (general) “doing business” as “exorbitant” on the black list, the American delegation insisted to have this ground for the exercise of jurisdiction generally acknowledged.

²⁴ Such a close connection exists under Article 6.1. Regulation, whenever “the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. Article 6.2. provide for other cases of “jurisdiction based on connection of fact” which would not easily be recognized by U.S.-Courts.

²⁵ Cf. *Borchers*, Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform, 40 Am.J.Comp.L. 121, 156 [1992].

²⁶ Article 15 *seq.* Regulation.

employment”²⁷ aim at the protection of the weaker party by rules of jurisdiction that are more favorable to the interests of consumers or employees than the general rules.

These differences in the approach to the jurisdiction issue may have no impact on the attitude of European practitioners to search for ways to avoid jurisdiction of an American Court in transatlantic cases. However, the opposition of European practitioners and lawmakers to the application of ambiguous concepts such as “minimum contacts” and “general doing business” as a basis for enabling the U.S.-Courts to exercise jurisdiction becomes more understandable in the light of the so-called “American rule”.

According to this rule the costs of the proceedings are allocated irrespective of the result of the lawsuit *pro rata*, whereas the European civil procedure adhere to the “the winner takes it all-rule”. Since the unsuccessful party need not compensate the winning party for the litigation costs, it is always expensive when jurisdiction of an American Court is exercised over a European party. The fact that a party must always envisage high expenses in the case of a lawsuit in an American Court may cause potential defendants from Europe to settle the dispute out of Court by a compromise²⁸.

Another argument for Europeans to avoid proceedings in an U.S.-Court is the involvement of a jury in lawsuits “at common law”. In federal Courts the plaintiff may request a jury, if the amount in controversy exceeds \$ 20²⁹, and experience of European defendants with juries (especially in products liability cases) indicates, that juries are not always impartial if they have to deliver a verdict in a case where the interests of an American and of a European party are conflicting.

3. Forum selection (prorogation of jurisdiction)

The national civil procedure laws³⁰ of the European States and the uniform European law on jurisdiction, and recognition and enforcement of foreign decisions in civil and commercial matters have always recognized the possibility of an agreement of the parties on the forum to adjudicate disputes. It has been the case for some time, and still is common practice, that jurisdiction clauses as well as clauses on the applicable law, (or eventually arbitration clauses), constitute an integral part of any international business contract. Consequently Art 23 of the “Regulation Brussels N° 1” provides that the parties (of whom one must be domiciled in a EU Member State) may agree “that a Court (or the Courts) of a Member State shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship” and that in this case the chosen Court (or Courts) shall have exclusive jurisdiction, unless the parties have agreed otherwise.

²⁷ Article 18 *seq.* Regulation.

²⁸ The dubious conduct of certain US attorneys announcing proceedings in U.S.-Courts, especially in product liability cases involving personal injury, is the consequence of the American rule and the contingency fee practice of the American Trial Lawyers.

²⁹ 7th Amendment of the US-Constitution.

³⁰ *Cf. e.g.* § 104 of the relevant Austrian “*Jurisdiktionsnorm*”.

Prior to the breakthrough decision of the U.S. Supreme Court in “*The Bremen v. Zapata Off-Shore Co.*”³¹ the U.S.-Courts refused to accept the derogatory effect of forum selection by the parties to an international contract, because the choice of forum by the parties collided with the power of the Courts of a state to adjudicate a case for which it clearly had jurisdiction under Common Law or a statutory provision, and meanwhile the rules on the validity of contractual choice of clauses has been consolidated³².

Whereas under American law the validity of a choice of forum clause is nevertheless still subject to a “reasonableness and fairness test”, the parties in Europe have to observe certain formal requirements when they agree on a prorogation. According to Article 23 of “Regulation Brussels N° 1”, the agreement must either be in writing or evidenced in writing³³, or “in a form which accords with practices which the parties have established between themselves”, or “in a form which accords with a widely known and regularly observed usage of international trade or commerce of which the parties are or ought to have been aware”. In general, there are, in Europe, no fundamental objections or legal obstacles against the power of the parties to a contract to agree on the forum that should decide a conflict emerging from the performance of their mutual contractual duties, and on the law that should apply thereto.

As indicated there are numerous and serious reasons for a European party to a transatlantic business transaction to attempt to escape the threat to be sued in a Court of the United States. Such a party must try to convince the other party from the other side of the Atlantic Ocean to agree to the jurisdiction of a neutral forum in Europe and to the application of the law of the selected forum. Most likely the European party will only be successful with such a suggestion, if he or she has sufficient bargaining capacity and if the conclusion of the contract is of higher importance and more urgent for the American partner. If no agreement on a neutral forum can be reached, an agreement on arbitration could be the cheapest and fastest solution for both parties.

4. Arbitration

The Common Law was not only opposed to forum selection clauses, but for a long time it refrained from accepting the replacement of a regular Court by an arbitral tribunal. This so called “non-ouster rule” had to give way to the new circumstances and practices of international trade and commerce and the first statute of an American State which accepted arbitration as an alternative method of dispute resolution was the New York Arbitration Act of 1920³⁴. Other statutory rules³⁵ and an International Convention³⁶ which the United States, “in an important and – for it – unprecedented step”³⁷ became a party followed.

³¹ *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972).

³² Cf. Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 Am.J.Comp.L. 977 [1992].

³³ A durably recorded communication by electronic means is an equivalent to writing.

³⁴ New York CPLR §§ 7501 ff.

³⁵ Federal Arbitration Act; Uniform Arbitration Act (adopted by the majority of the US States).

³⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958).

³⁷ *Von Mehren*, Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful? 57 *Rechts Z* 451 [1993].

In the European Union the statutory basis for arbitration is national law, Thus the Austrian Civil Procedure code provides some 20 provisions on Arbitral proceedings³⁸, which deal with the substantial and formal requirements of an arbitration agreement, the proceedings in the arbitration tribunal, the annulment of an arbitral award. In addition thereto, many institutions such as the International Chamber of Commerce³⁹, UNCITRAL⁴⁰, the American Arbitration Association⁴¹ and numerous other institutions like national chambers of commerce are offering arbitration based on their own rules.

Today arbitration is widely accepted and practiced among businessmen engaged in international transactions on both sides of the Ocean.

5. Recognition and Enforcement

As mentioned earlier, the enforcement of judgments of an U.S. Court may create more serious problems in Austria than *vice versa*. And with regard to transatlantic executory titles this is not only true for Austria. The reason for this situation is, on the one hand, the absence of state treaties between the European States and the U.S.⁴², and, on the other hand, the absence of a national law that would provide a generous solution similar to that of the Uniform Foreign Money-Judgments Recognition Act of 1962, which has been enacted by a number of American States, among them California and New York.

Whereas the reciprocity requirement is not provided for by the American Uniform Law, it is *e.g.* a mandatory condition for the enforcement of foreign titles under § 79 of the Austrian Enforcement Act that reciprocity is either guaranteed by a state treaty or by a regulation of the Ministry of Justice. Neither instrument exists in Austria so far.

Other European States such as Germany are not as strictly adherent to formal requirements, but are based on substantive reciprocity: This means that if, in fact, the courts of an American State recognize and enforce German money judgments, the German courts will proceed correspondingly.

6. Conclusions

Today there is a common understanding among the specialists on both sides of the Atlantic Ocean that jurisdiction in the United States and in Europe is based on different assumptions. An American author's conclusion of a comparative analysis of the rules on personal jurisdiction in Europe as stated in the Brussels Convention and those applied by American Courts, that "jurisdictional practice in the United States is

³⁸ §§ 577-599 Austrian Civil Procedure Code.

³⁹ ICC Arbitration Rules, ICC Publ. N° 581.

⁴⁰ General Assembly Resolution 31/98, 15 Dec. 1976.

⁴¹ AAA International Arbitration Rules (1997).

⁴² This is obviously attributable to the fact that the US Dept. of State, according to *von Mehren*, 57 *RebelsZ* 451, footnote 4 [1993], "had declined as early as 1874 to use the treaty-making power in the area of Private International Law and the recognition and enforcement of judgments".

deficient both in fairness and predictability”⁴³ is probably excessively critical. Nevertheless it is the jurisdiction issue that, on the purely law-related level, causes the greatest problems for draftsmen of an International Convention on Jurisdiction and Recognition and Enforcement of Foreign judgments, and for practitioners specializing in the field of transatlantic business transactions. Recognition and enforcement, selection of forum, or arbitration provide no major practical problems, It is rather the conduct of American attorneys who – obviously too numerous for the United States market of legal services and searching for new field of activity – are sometimes resorting to a conduct which is unusual in Europe and often appears unfair to Europeans: On the basis of the “American rule” of allocating the costs of proceeding irrespective of the outcome of the lawsuit, they often put pressure on European businessmen and their counsels to settle a dispute by a compromise.

Thus, there are legal and – probably even more important – sociological differences between the United State and Europe that are responsible for the “jurisdiction conflict” diagnosed already some time ago by European scholars and evidenced by the impasse in the negotiations in The Hague.

⁴³ *Borchers*, Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform, 40 *Am.J.Comp.L.* 121, 156 [1992].